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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 Thomas W. McNamara,

12 Plaintiff,

13 v.

14 Francis Lee, et al.,

15 Defendants.

Case No. 11cv1344 BTM (WMc)

**ORDER**

16 On September 22, Plaintiff filed his Motion for Service of Shane Kavanagh, Contegra  
17 Capital, LLC, Ira Gillum and Good Silver, Inc by Publication (Dkt. 17) (hereinafter "Section  
18 415.50 Motion") and his Motion for Authorization To Serve Process upon the California  
19 Secretary of State for Defendant San Andrea's Insurance Agency, LLC (Dkt. 18) (hereinafter  
20 "Section 17061(c)(1) Motion"). For the reasons set forth below, this Court DENIES Plaintiff's  
21 Section 415.50 Motion without prejudice and DENIES Plaintiff's Section 17061(c)(1) Motion  
22 without prejudice. Additionally, the Court GRANTS Plaintiff a ninety (90) day extension of  
23 the time limit for service with respect to defendants Shane Kavanagh, Contegra Capital, LLC,  
24 Ira Gillum, Good Silver, Inc and San Andrea's Insurance Agency, LLC.

25  
26 **Section 415.50 Motion**

27 The California Code of Civil Procedure permits service by publication "as a last resort."  
28 Donel Inc. v. Badalian, 87 Cal. App. 3d 327, 332 (2d Dist. 1978). "Personal service remains

1 the method of choice under the statutes and the constitution. . . . When substituted or  
 2 constructive service is attempted, strict compliance with the letter and spirit of the statutes  
 3 is required.” Olvera v. Olvera, 232 Cal. App. 3d 32, 41 (4th Dist. 1991).

4 California Code of Civil Procedure Section 415.50(a)(1) permits service by publication  
 5 only “if *upon affidavit* it appears to the satisfaction of the court in which the action is pending  
 6 that . . . [a] cause of action exists against the party upon whom service is to be made or he  
 7 or she is a necessary or proper party to the action.” (Emphasis added.) In other words,  
 8 Section 415.50 requires that the plaintiff provide independent evidentiary support, in the form  
 9 of a sworn statement of facts, for the existence of a cause of action against the defendant.  
 10 Harris v. Cavasso, 68 Cal. App. 3d 723, 726 (3d Dist. 1977) (holding that Section  
 11 415.50(a)(1) requires “an affidavit containing a statement of some fact which would be legal  
 12 evidence, having some appreciable tendency to make the [the cause of action] appear, for  
 13 the Judge to act upon before he has any jurisdiction to make the order” authorizing service  
 14 by publication).

15 For example, in City and County of San Francisco v. Upp, No. A123528, 2011 WL  
 16 1197524 (Cal. App. 1st Dist. Mar. 30, 2011), the court affirmed a trial court order vacating  
 17 a default judgment because the declaration supporting service by publication was legally  
 18 insufficient. Upp concerned building code and nuisance claims brought by the City of San  
 19 Francisco. The City’s declaration supporting service by publication, signed by an attorney  
 20 for the City, contained a “short paragraph” stating that the defendant’s property was a  
 21 nuisance and that it had unsafe parapet walls. Id. at \*5. The court in Upp stated that these  
 22 “conclusory” statements were “insufficient to support a cause of action,” and noted that “the  
 23 declaration fails to explain how it is that a deputy city attorney has personal knowledge of the  
 24 condition of . . . parapet walls . . . .” Id. at 5.

25 In this case, the Declaration of Daniel M. Benjamin supporting the Section 415.50  
 26 Motion (“First Benjamin Declaration”) makes no mention of any facts supporting the  
 27 existence of a cause of action against any named defendants in this case. The  
 28 memorandum of law supporting the motion includes statements regarding the amounts

1 Plaintiff seeks to recover from the named Defendants, but these statements are not included  
 2 in an affidavit or a sworn declaration, nor is there any indication that these facts are known  
 3 first-hand by Mr. Benjamin (Plaintiff's attorney). In short, the First Benjamin Declaration is  
 4 "devoid of any facts from which the trial court could draw the conclusion that a cause of  
 5 action existed against defendants." Harris v. Cavasso, 68 Cal.App.3d at 726.

6 Additionally, Code of Civil Procedure Section 415.50(a) states that the affidavit  
 7 supporting service by publication must show that "the party to be served cannot with  
 8 *reasonable diligence* be served in another manner specified in this article." (Emphasis  
 9 added.) The statutory requirements that the plaintiff exercise reasonable diligence and that  
 10 he submit evidence of such diligence to the court are "required by notions of fair play and  
 11 justice embodied in the concept of due process of law . . . before resorting to the fictional  
 12 notice afforded by publication." Donel, Inc., 87 Cal. App. 3d at 332. Citing the Judicial  
 13 Council Comment to Section 415.50, the court in Kott v. Superior Court, 45 Cal. App. 4th  
 14 1126 (2d Dist. 1996), stated:

15 The term 'reasonable diligence' takes its meaning from the former law: it  
 16 denotes a *thorough, systematic investigation* and inquiry conducted in good  
 17 faith by the party or his agent or attorney. A number of honest attempts to  
 18 learn defendant's whereabouts or his address by inquiry of relatives, friends,  
 19 and acquaintances, or of his employer, and by investigation of appropriate city  
 20 and telephone directories, the voters' register, and the real and personal  
 property index in the assessor's office, near the defendant's last known  
 location, are generally sufficient. These are likely sources of information, and  
 consequently *must be searched before resorting to service by publication.*"

21 Id. at 1137 (citing Cal. Judicial Council Com., 14 West's Ann. Code Civ. Proc. (1973 ed.))  
 22 (emphasis added). In the sworn statement supporting the request for service by publication,  
 23 the plaintiff must detail these necessary efforts to serve by other means. See Sanford v.  
 24 Smith, 11 Cal. App. 3d 991, 999 (1st Dist. 1970) ("A test of the sufficiency of the affidavit is  
 25 whether it is so clear and certain that a charge of perjury could be sustained if its specified  
 26 facts showing diligence are false.").

27 The First Benjamin Declaration, on its face, fails to establish reasonable diligence  
 28 within the meaning of the rule. With respect to each of the four defendants listed in the

1 Section 415.50 Motion, it references “internet searches” conducted by Mr. Benjamin’s staff  
 2 (§§ 7, 15 and 20), but the content of these searches is unstated and therefore the Court is  
 3 unable to determine whether Plaintiff has investigated all necessary sources of information.  
 4 Additionally, the First Benjamin Declaration states that Plaintiff hired a private investigator  
 5 to find Shane Kavanagh, to no avail. (*Id.* at ¶ 4.) However, it does not list any of the steps  
 6 taken by the private investigator to locate Mr. Kavanagh, nor does it include as an exhibit a  
 7 sworn statement by the private investigator, and thus the Court is unable to determine  
 8 whether the private investigator’s efforts were sufficient to establish reasonable diligence.  
 9 *Cf. Kott*, 45 Cal. App. 4th at 1132, 1137-38 (finding no reasonable diligence, despite  
 10 submission of investigator’s affidavit, where affidavit showed that investigator never followed  
 11 crucial lead). Thus, aside from its failure to provide independent support for Plaintiff’s cause  
 12 of action against the defendants named in the Section 415.50 Motion, the First Benjamin  
 13 Declaration also falls short of establishing Plaintiff’s reasonable diligence with the requisite  
 14 level of detail.

#### 15 16 **Section 17061(c)(1) Motion**

17 California Corporations Code Section 17061(c)(1) permits service on limited liability  
 18 companies by hand-delivering to the California Secretary of State a copy of the process,  
 19 together with a court order authorizing such service. A court may enter an order authorizing  
 20 such service “if the designated agent [for the LLC] cannot with *reasonable diligence* be found  
 21 at the address designated for personal delivery of the process, and it is shown by affidavit  
 22 to the satisfaction of the court that process against a limited liability company or foreign  
 23 limited liability company cannot be served with *reasonable diligence* upon the designated  
 24 agent . . . .” Cal. Corp. Code § 17061(c)(1). The Court interprets “reasonable diligence” in  
 25 Section 17061(c)(1) to require the same efforts to serve by other means as Cal. Code. Civ.  
 26 P. § 415.50.

27 Plaintiff’s Section 17061(c)(1) Motion seeks an order authorizing Plaintiff to serve  
 28 Defendant San Andrea’s Insurance Agency, LLC by personal service on the California

1 Secretary of State. The Declaration of Daniel M. Benjamin supporting the Section  
 2 17061(c)(1) Motion ("Second Benjamin Declaration") states that Plaintiff attempted to serve  
 3 Patricia Lopez, San Andrea's registered agent for service of process, at the address  
 4 registered with the California Secretary of State. (Second Benjamin Dec. ¶¶ 2-3.) It also  
 5 states that Plaintiff used a research tool called "Merlin" to search for Patricia Lopez, and  
 6 attempted service at a second address produced by that search. (*Id.* ¶¶ 6-7.) Lastly, the  
 7 Second Benjamin Declaration states that "[s]taff acting under [Mr. Benjamin's] direction  
 8 conducted internet searches for San Andrea's Insurance Agency, which revealed little useful  
 9 information." (*Id.* ¶ 5.)

10 As with the similar statements in the First Benjamin Declaration (*see* First Benjamin  
 11 Dec. ¶¶ 4, 7, 15 and 20), the statements that Plaintiff used an internet search tool called  
 12 "Merlin" and that Mr. Benjamin's staff "conducted internet searches" are not sufficient to  
 13 establish reasonable diligence where there is no explication whatsoever of the contents of  
 14 those searches.

### 16 Conclusion

17 Based on the forgoing, the Court DENIES without prejudice Plaintiff's Section 415.50  
 18 Motion and DENIES without prejudice Plaintiff's Section 17061(c)(1) Motion. The Court also  
 19 GRANTS Plaintiff a ninety (90) day extension of the time limit for service with respect to  
 20 defendants Shane Kavanagh, Contegra Capital, LLC, Ira Gillum, Good Silver, Inc and San  
 21 Andrea's Insurance Agency, LLC. *See* Fed. R. Civ. P. 4(m).

23 **IT IS SO ORDERED.**

24 Dated: October 5, 2011

  
**HONORABLE BARRY TED MOSKOWITZ**  
 United States District Judge